

# The Paradox of Paternalism and Laissez-Faire Constitutionalism: United States Supreme Court, 1888–1921

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In 1898, the year Americans first sailed forth to fight in other countries to protect purported victims of imperialism, A. V. Dicey steamed into Harvard University to deliver his lectures on Law and Public Opinion in England. Like William Blackstone, Vinerian Professor before him, Dicey deployed a number of memorable epigrams to capture what seemed basic truths of his day. Dicey's assertion that 'protection invariably involves disability'<sup>1</sup> appeared to state the obvious to Americans at the turn of the century.

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I have been lucky for years with research assistants. Margaret Geary was exceptionally helpful in writing this paper. I am grateful to her, and to Janice Brown, Lance Cassak, Steve Lincoln, and Anita Mari as well as to colleagues and friends at Boston University, and faculty—particularly Stanley Kutler, Robert Gordon, and Willard Hurst—and fellow Fellows at the University of Wisconsin.

1. A. V. Dicey, *Lectures on Law and Public Opinion in England During the Nineteenth Century* (London, 1905) 150 n.1. Dicey thought this point 'elementary' but 'worth insisting upon'. My friend Carol Weisbrod of the University of Connecticut School of Law first alerted me to this passage. The nexus between law, public opinion and the relative protection of the flag and the Constitution as they travelled the globe was obvious to Finley Peter Dunne. Indeed, his most famous saying was, 'No matter whether th' constitution follows the' flag or not, th' Supreme Court follows th' iliction returns'. Finley Peter Dunne, 'The Supreme Court Decisions' in Elmer Ellis, ed., *Mr. Dooley at His Best* (Hamden, 1938) 77. But long after San Juan Hill and Manila Bay, the vexing issue of how much protection the flag, the Constitution, or some combination thereof should provide individuals and corporations overseas still confused United States Supreme Court Justices as well as the rest of the population. I hasten to reassure that this subject is not one I wish to explore here.

For recent work considering Blackstone's great influence in the United States, see, e.g., Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge, 1985) 15 ('the *Commentaries* rank second only to the Bible as a literary and intellectual influence on the history of American institutions'); R. Kent Newmyer, *Supreme Court Justice*

In this essay I will consider how the United States Supreme Court embraced Dicey's epigram and translated it into decisions during the tenures of Chief Justices Fuller and White about the capacity of the individual in the United States to contract and care for himself. By focusing on the Court from 1888 to 1921, I do not seek to demonstrate again that there is and always has been a chasm between law in books and law in action. Nor do I make any claim that paternalism was a new problem when Fuller succeeded Waite, or a problem that had been resolved in 1921 when Taft took the enlarged seat he coveted at the center of the Court. My thesis is that under the guise of a formalistic, unitary vision of categories such as individual autonomy and citizenship, the Justices subdivided and manipulated legal doctrine about suitable protection in a way that arrogated tremendous discretionary power to themselves. In proclaiming both their authority and their ability to distinguish between people as individuals and as members of groups, the judicial brethren became the paternalistic patriarchs.

In considering efforts to restrict what judges viewed as debilitating paternalism masquerading as protection, I will use the following as a definition of paternalism: a decision made by someone for someone else, allegedly for the latter's own good. Paternalism relates directly to Dicey's formulation. Can one have protective legal intervention without making some statement about the disability of purported beneficiaries?

To the modern eye, or to even a mediocre anagrams player, there is an obvious connection between the loathed concept 'paternalism' and the more neutral, if not positive, notion of 'parentalism'. Yet paternalism remains one of our most powerful pejoratives.

*Lochner v. New York*,<sup>2</sup> nearly always invoked to categorize the entire era, is still shorthand in constitutional law for the worst sins of subjective judicial activism.<sup>3</sup> I am not here concerned with all of the ways in which *Lochner* itself may have been anomalous,<sup>4</sup> but I am interested in the concept of

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Joseph Story (Chapel Hill, 1985) 40–43, 243–46; Robert M. Cover, *Justice Accused: Antislavery and the Judicial Process* (New Haven, 1975) 16; Dennis R. Nolan, 'Sir William Blackstone and The New American Republic: A Study of Intellectual Impact', 51 *New York University Law Review* 731 (1976). For general consideration of A.V. Dicey, see Richard A. Cosgrove, *The Rule of Law: Albert Venn Dicey, Victorian Jurist* (London, 1980) and a provocative review, David Sugarman, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science', 46 *Modern Law Review* 102 (1983).

2. *Lochner v. New York*, 198 U.S. 45 (1905).

3. See, e.g., John Hart Ely, 'The Wages of Crying Wolf: A Comment on *Roe v. Wade*', 82 *Yale Law Journal* 920, 944 (1973) (Ely actually uses 'Lochnering', but I find 'Lochnerizing' more felicitous).

4. The best-known exception prior to *Lochner* was *Holden v. Hardy*, 169 U.S. 366 (1898), which allowed Utah to limit to ten hours the maximum miners could work per day, for reasons of health and safety. Less well known are several other decisions in which the Court announced, for example, that '[i]t is within the undoubted power [of Congress] to restrain some individuals from some contracts'. The author of this statement was none other than Justice David Brewer, writing for a unanimous Court in *Frisbie v. United States*, 157 U.S. 160, 165 (1895). That decision upheld a criminal

autonomous individualism inherent in the notion of liberty of contract which was at stake in *Lochner*. That legal idea affords a means to examine how true the Court was to prevailing laissez-faire principles.<sup>5</sup>

Grant Gilmore's observation that '[t]he few people . . . who have ever spent much time studying the judicial product of the period have been appalled by what they found'<sup>6</sup> is in itself an intriguing challenge. Moreover, a sampling of judicial decisions involving governmental protection of those deemed unfit shows that the Justices were caught in a bind of their own creation, forced to perform gymnastic feats to find and hold the line between legal spheres they claimed they were obliged to separate. The Justices manipulated the deductive pretensions of their categorical approach to people as individuals and as members of groups in several ways. While acting aggressively to protect the interests of corporations,<sup>7</sup> which were

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conviction imposed on a lawyer for charging more than the statutory maximum allowed for processing a widow's pension under the Dependent Pension Act of 1890. See also Holmes's statement in *Minnesota Iron Co. v. Kline*, 199 U.S. 593, 598 (1905) ('There is no doubt that [freedom of contract] may be limited where there are visible reasons for public policy for the limitation.'). *Cantwell v. Missouri*, 199 U.S. 602 (1905). Decisions also permitted states to forbid or severely restrict access to cigarettes, liquor and oleomargarine, see, e.g. *Austin v. Tennessee*, 179 U.S. 343 (1900); *James Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917); *Powell v. Pennsylvania*, 127 U.S. 678 (1888). *Muller v. Oregon*, 208 U.S. 412 (1908) and *Bunting v. Oregon*, 243 U.S. 426 (1917) are additional well-known exceptions to the traditional understanding of the *Lochner* doctrine; these decisions allowed states to act with explicit paternalism toward women. See generally David P. Currie, 'The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910', 52 *University of Chicago Law Review* 324 (1985).

5. Laissez-faire itself is, of course, not a concept that is easily defined. See Lionel Robbins, *The Theory of Economic Policy in English Classical Political Economy* (London, 1952); Calvin Woodard, 'Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State', 72 *Yale Law Journal* 286 (1962). As with 'Social Darwinism' and 'formalism', whose heyday laissez-faire is often thought to have shared, much of the definition must rely on context. See generally P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, 1979).
6. Grant Gilmore, *The Ages of American Law* (New Haven, 1977) 60.
7. A generation ago, Robert McCloskey suggested that during this era '[t]he major value of the Court . . . was the protection of the business community against government'. Robert McCloskey, *The American Supreme Court* (Chicago, 1960) 105. Among the best of additional earlier sources for this view, see Sidney Fine, *Laissez-Faire and the General-Welfare State* (Ann Arbor, 1956); Clyde E. Jacobs, *Law Writers and the Courts: The Influence of Thomas M. Cooley, Christopher G. Tiedeman, and John F. Dillon upon American Constitutional Law* (Berkeley, 1954); Robert McCloskey, *American Conservatism in the Age of Enterprise* (Cambridge, 1951); Richard Hofstadter, *Social Darwinism in American Thought* (Philadelphia, 1944); Benjamin R. Twiss, *Lawyers and the Constitution: How Laissez-Faire came to the Supreme Court* (Princeton, 1942) [hereinafter cited as Twiss, *Lawyers and the Constitution*]; Edward S. Corwin, *The Twilight of the Supreme Court* (New Haven, 1934); Matthew Josephson, *The Robber Barons* (New York, 1934); Max Lerner, 'The Supreme Court and American Capitalism', 42 *Yale Law Journal* 668 (1933).

McCloskey's observation still seems generally accurate today, even if we recall what

proclaimed to have equal rights as persons, they acted with paternalistic condescension toward others, such as women, Indians, and sailors, whose claims for equal treatment they viewed as contrary to the natural order. Simultaneously, however, the Court disabled some citizens, such as blacks, by approaching their claims with extreme arms-length formality, declaring that black men already had achieved full legal equality.

The paradox of paternalism—encouraging and applying some form of protection while excoriating and invalidating others—may also fill some of the void left by the shrinking of the orthodox view of laissez-faire constitutionalism. There has been considerable recent scholarly debate about the extent of Social Darwinism in late nineteenth century America. Indeed, David Hollinger quipped, ‘Social Darwinism can now claim a dubious honor: that it has been shown not to have existed in more places than any other movement in the history of social theory’.<sup>8</sup> Yet the avoidance of paternalism was an appealing surrogate for more explicit Social Darwinist rhetoric:<sup>9</sup> whatever terminology was used, legal materials from the period

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Charles Beard used to tell his students: the historian’s ‘best equipment’ is to remember that ‘the very opposite of accepted faith may be true’ (quoted in Ellen Nore, ‘Charles A. Beard’s Act of Faith: Context and Contest’, *Journal of American History* 66 (1980) 850).

Standouts within the recent work refining or redefining our understanding of the legal history of the period are Charles W. McCurdy, ‘Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897’, *Journal of American History* 61 (1975) 970; Michael Les Benedict, ‘Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism’, *Law and History Review* 3 (1985) 293; John E. Semonche, *Charting The Future: The Supreme Court Responds to a Changing Society* (Westport, 1978). For an overview of the era, see Alexander M. Bickel and Benno C. Schmidt, Jr., *History of the Supreme Court of the United States: The Judiciary and Responsible Government* (New York, 1984).

There is a generational pattern, of course, to today’s revisions of revisionists; now scholars search for order in the period roughly from 1880 to 1920 and some profess little faith that we would know a Progressive or a robber baron if we saw one. (For a helpful historiographic overview, see Daniel T. Rodgers, ‘In Search of Progressivism’, *Reviews in American History* 10 (1982) 113. See also Robert H. Wiebe, *The Search for Order, 1877–1920* (1967).)

Of course, Willard Hurst and his *oeuvre* blazed the legal history trail for these and many other issues. Though this paper certainly does not show it adequately, particularly since it concentrates on doctrinal developments in Supreme Court decisions, I am personally very much in Willard’s and Frances’s debt. In addition to many other kindnesses, they allowed my family and me to use their home—and Willard’s office—during the University of Wisconsin Legal History Workshop in the summer of 1982 while I worked on this paper.

8. David A. Hollinger, ‘Comments on Papers by Sharlin and Wall’ in ‘Symposium on Spencer, Scientism and American Constitutional Law’, *Annals of Science* 33 (1976) 476.
9. The recent debate about terminology, in particular about Social Darwinism and the influence of Herbert Spencer, is largely the result of revisionist attacks on Richard Hofstadter, *Social Darwinism in American Thought*, *supra* note 7. Examples of that attack include Joseph Frazier Wall, *Andrew Carnegie* (New York, 1970); Robert C.

from the 1880s into the 1920s suggest that combating paternalism was a core concern among judges and lawyers.

Americans need not have read or believed all of Herbert Spencer's *Social Statistics*, of course, to fear governmental regulation and to celebrate the autonomy of vigorous, manly citizens free of invidious, paternalistic coddling. As Charles Sanders Peirce put it, in an age pervaded by a 'dominant gospel of greed', men 'seemed to relish a ruthless theory'.<sup>10</sup> It was a period in which the great race of life, premised somehow on the notion of an equal start, was a dominant American image. The tendency to harden this egalitarian image into ruthlessness gained strength from innumerable, mutually enforcing influences, including bedrock Calvinist values, Ben Franklin-like homilies, Oliver Wendell Holmes, Jr.'s bitter deference to the cosmos, and the muscular Christianity of the period, which promoted the quest for manliness and godliness in the gymnasium, on distant battlefields, and in legal and economic combat.

Robert Gordon recently noted that Americans came to be 'obsessively judge-centered'<sup>11</sup> in the late nineteenth century; I will explore a few elements of what that obsession might have entailed. In particular, I will discuss the incoherence of anti-paternalism, which was a basic facet of the

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Bannister, *Social Darwinism: Science and Myth in Anglo-American Social Thought* (Philadelphia, 1979) and the Symposium on Spencer, *supra* note 8. As this essay makes clear, I am not fully persuaded by arguments such as that by Wall about what conclusions properly may be drawn from the paucity of explicit citations to Spencer, *ibid.*, particularly when anti-paternalism could carry much of the Social Darwinist load, as it did, for example, in the brief for appellants in *Lochner v. New York*, 198 U.S. 45 (1905), quoted by Wall at 471. For a good compendium with useful introductory essays, see R. Jackson Wilson, ed., *Darwinism and the American Intellectual* (Homewood, 1967).

10. Quoted in an excellent book, R. Jackson Wilson, *In Quest of Community: Social Philosophy in the United States, 1860–1920* (New York, 1968) 56. For similar ideas about the thought of Holmes and Langdell, see Robert W. Gordon, 'Holmes' *Common Law* as Legal and Social Science', 10 *Hofstra Law Review* 719, 722–23 (1982) (tendency of the age 'to treat the world as a hard object gradually being discovered by means of the suppression of human subjectivity'); Thomas C. Grey, 'Langdell's Orthodoxy', 45 *University of Pittsburgh Law Review* 1 (1983) (impact of analogy to geometry).

For fine examples of the outpouring of important recent work on the period and its dominant motifs, see John L. Thomas, *Alternative America: Henry George, Edward Bellamy, Henry Demarest Lloyd and the Adversary Tradition* (Cambridge, 1983); Robert M. Crunden, *Ministers of Reform: The Progressives' Achievement in American Civilization 1889–1920* (New York, 1982); Stuart Creighton Miller, *'Benevolent Assimilation': The American Conquest of the Philippines, 1899–1903* (New Haven, 1982); James C. Whorton, *Crusaders for Fitness: The History of American Health Reformers* (Princeton, 1982).

11. Robert W. Gordon, 'Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920', in Gerald L. Geison, ed., *Professions and Professional Ideologies in America, 1730–1940* (Chapel Hill, 1983) 70–110; see generally Loren P. Beth, *The Development of the American Constitution, 1877–1917* (New York, 1971); Thomas K. McCraw, *Prophets of Regulation* (Cambridge, 1985); Duncan Kennedy, 'Form and Substance in Private Law Adjudication', 89 *Harvard Law Review* 1685 (1976).

theory which produced countless examples of judicial ruthlessness in a crusade to root out legislative or executive paternalism, and to eliminate excessive protection for the downtrodden by our lower court judges. The United States Supreme Court played only one part in the story, of course. The highest state courts generally competed with one another for the starkest application of freedom of contract and the truest belief in laissez-faire ideology. State courts probably had the most immediate impact and did much to shape public consciousness about legal doctrine. State court decisions invalidating legislative aid to victims of fires and floods, perceived as overly paternalistic, joined holdings striking down such legislative coddling as aid to the blind, competitive merit scholarships for a state university, and standardized scales and scrip laws for miners and factory workers. There is something to Charles Warren's assertion, after he surveyed all the United States Supreme Court's decisions about state police powers from 1887 to 1911, that '[t]he National Supreme Court, so far from being reactionary, has been steady and consistent in upholding all state legislation of a progressive type'.<sup>12</sup> Moreover, we cannot know if, had they been polled, nearly all Americans—or even nearly all native-born, white male Americans—might have enthusiastically endorsed particular United States Supreme Court decisions or even the general pattern of such decisions.<sup>13</sup>

My claim is narrower and necessarily more impressionistic. In pursuit of

12. Warren's articles reporting the results of his survey of 560 Supreme Court decisions from 1888–1911 bore such titles as 'The Progressiveness of the United States Supreme Court' and 'A Bulwark to the State Police Power', 13 *Columbia Law Review* 294 and 667 (1913). In his famous two-volume history of the Supreme Court, Charles Warren, *The Supreme Court in United States History* (Boston, 1926) 742–44. Warren updated his survey to include such decisions as *Adair* and *Coppage* but he held firm to his conclusion. Warren's sampling technique is subject to some criticism—e.g., police power decisions were not the only source of restrictive constitutional holdings, as developments in doctrinal categories such as Contract Clause and Commerce Clause make clear—but his point is too often overlooked. It appears that Warren himself may have had a change of heart or head about the issues he surveyed. As a young man, Warren wrote a broadside condemning Massachusetts for granting pensions and for otherwise 'taking public money for private uses under the guise of charity'. Charles Warren, 'Massachusetts as a Philanthropic Robber', 12 *Harvard Law Review* 316, 318 (1898).

Lochnerizing did not really arrive until after World War I. For a handy scorecard of that doctrine's impact during the 1920s, see Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* (Cambridge, 1938).

13. William Jennings Bryan's attack on the federal judiciary during the tumultuous presidential campaign of 1896 and Theodore Roosevelt's vehement appeal for popular recall of state judicial decisions in the 1912 campaign do indicate that capable politicians believed their attacks on judicial decisions might create popular campaign issues. The fact that these presidential candidates lost does not prove popular support for their judicial targets; it is impossible to measure a national obsession with precision. See Stephen Stagner, 'The Recall of Judicial Decisions and the Due Process Debate', 24 *American Journal of Legal History* 257 (1980). The same journal issue also contains interesting related articles, Walter F. Pratt, 'Rhetorical Styles on the Fuller Court', at 189 and Charles C. Goetsch, 'The Future of Legal Formalism', at 257.

an element of the *mentalité* or consciousness of legal opinion-makers who gained professional ascendancy from the Gilded Age into the early Jazz Age—men from a cohort sharply reduced in numbers by the Civil War and perhaps hardened by it as well—I will consider the legal construct of the autonomous individual by focusing upon judicial decisions which added to or subtracted from that legal fiction. The Justices' mathematical machinations allowed them to become the nation's ultimate paternalists, even as they devoted themselves tenaciously to rooting out paternalism whenever they perceived it. The manipulability of the paternalism concept in constitutional law after the end of Reconstruction and the paradoxical results of such manipulation remain largely unexplored. It is revealing to consider to what extent those already on top benefited and those on or near the bottom suffered as a result of the process through which Justices made their choices.

Several themes emerge from scrutiny of a series of relatively obscure Supreme Court decisions handed down when laissez-faire thought was dominant. First, I respond briefly to recent legal history revisionists as I examine the breakdown of the notion of unified American citizenship. Then, confining my discussion largely to enforcement of contracts through a focus on thirteenth amendment challenges, I explore what judges seem to have meant by individual freedom. Finally, I argue that paternalism provided a convenient, almost infinitely distensible target: it enabled the Justices to bull their way through complexities in order to constitutionalize their anti-paternalistic notions and to act as if their ideas had been deduced from some deep structure of constitutional liberty.

In recent years, historians have begun to focus on the elusive concept of paternalism largely but not exclusively in the context of slavery.<sup>14</sup> A series of snapshots taken from Supreme Court decisions about the thirteenth amendment, however, involves not only black people, as we would expect, but also a more varied cast of characters. In fact, it is reminiscent of Peter Pan.<sup>15</sup> Sailors, Indians, and others often considered eternal children found themselves before the Supreme Court in thirteenth amendment disputes.

14. The pathbreaking work is Eugene D. Genovese, *Roll, Jordan, Roll* (New York, 1974) and it is criticized in James Oakes, *The Ruling Race* (New York, 1982). See also, e.g., William S. McFeely, *Yankee Stepfather* (New Haven, 1968), in which McFeely pursues the theme in the context of the Freedmen's Bureau; Herman Belz, *A New Birth of Freedom* (Westport, 1976) and Herman Belz, *Reconstructing the Union* (Ithaca, 1969), considering the tension between paternalism and individualism in Congressional goals as the Civil War ended. See also Janet Sharp Hermann, *The Pursuit of a Dream* (New York, 1981), a fascinating chronicle of an Owenite experiment on a Mississippi plantation owned by Jefferson Davis's brother, who sold it after the Civil War to the former slaves who had worked the fields and cotton gins. For important recent considerations of paternalism moving beyond slavery and its immediate aftermath, see e.g., James M. McPherson, *The Abolitionist Legacy* (Princeton, 1975); David Montgomery, *Beyond Equality* (New York, 1967). For a useful study of English varieties, see David Roberts, *Paternalism in Early Victorian England* (New Brunswick, 1979). Cf. Richard Sennett, *Authority* (New York, 1980).

15. J.M. Barrie's *Peter Pan* was first performed in London in 1904. The portrait of Wendy

## I. Setting the Stage

When lame-duck President Cleveland nominated Melville W. Fuller for Chief Justice in 1888, Fuller faced vigorous opposition from Republican senators who feared for the fruits of the Civil War victory under the constitutional guardianship of 'disloyalists' like Fuller.<sup>16</sup> But Fuller had the advantage of being 'the most obscure man ever appointed chief justice'.<sup>17</sup> Moreover, he seemed quite safe on the issue of paternalism. In a book review for Chicago's fledgling literary magazine, *The Dial*, Fuller had written: 'Paternalism, with its constant intermeddling with individual freedom, has no place in a system which rests for its strength upon the self-reliant energies of the people.'<sup>18</sup> This widely-shared, if not hackneyed, sentiment coincided with the views of Cleveland and most Democrats; it was also not terribly far removed from the proclamations of many Republicans.<sup>19</sup>

The legal harvest of Civil War reforms in constitutional amendments and civil rights statutes largely had been lost already. A remarkable string of Supreme Court decisions either invalidated or narrowed to the point of oblivion the constitutional commands and statutory protections enacted during the first decade after the war.<sup>20</sup> In the 1883 *Civil Rights Cases*, the

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as housewife, who believes that 'Father knows best', is particularly striking. But that is another story.

16. Willard L. King, *Melville W. Fuller, Chief Justice of the United States, 1888-1910* (New York, 1950) 120. Senator George F. Edmunds (R.-Vt.) led the opposition to Fuller from his base as chairman of the Senate Judiciary Committee; he was able to discover actions by Fuller during the Civil War that smacked of Copperhead sentiments. Nevertheless, Fuller was confirmed by a 41 to 20 vote. See generally *ibid.* at 114-24.
17. *Ibid.* at 114, quoting the *Philadelphia Press*. For a somewhat similar description of White, see Robert B. Highsaw, *Edward Douglass White: Defender of the Conservative Faith* (Baton Rouge, 1981).
18. Willard L. King, *Melville W. Fuller*, *supra* note 16 at 90.
19. For example, *The Nation* in 1887 praised President Cleveland for his 'firm and pronounced stand against paternalism in government' in his refusal to allow federal drought and flood relief, and for his veto of what *The Nation* dubbed the 'Pauper Pension bill'. *The Nation* 44 (March 10, 1887) 202. Cleveland had given the country the important lesson that 'though the people support the government, the Government should not support the people'. *Ibid.* Cleveland repeatedly sounded the antipaternalism theme, as he did in his veto of the Texas Seed Bill on February 16, 1887, when he warned that federal aid to drought-stricken Texas farmers 'encourages the expectation of paternal care on the part of the government and weakens the sturdiness of our national character, while it prevents the indulgence among our people of that kindly sentiment and conduct which strengthen the bonds of common brotherhood'. George F. Parker, ed., *The Writings and Speeches of Grover Cleveland* (New York, 1892) 450. See generally Morton Keller, *Affairs of State* (Cambridge, 1977); R. Hal Williams, *Years of Decision* (New York, 1978).
20. Compare, e.g., *Blyew v. United States*, 80 U.S. (13 Wall.) 581 (1872); *United States v. Reese*, 92 U.S. 214 (1876); *United States v. Cruikshank*, 92 U.S. 542 (1876); *United*



Supreme Court declared that black citizens had already shaken off the effects of slavery, noting that their progress was now such that they should 'take the rank of a mere citizen' and cease to be the 'special favorites of the laws'.<sup>21</sup> By the time Fuller reached the bench, the Court had declared that corporations also were to enjoy fourteenth amendment protection.<sup>22</sup> Thus whites, blacks and corporations were considered self-sufficient equals before the law. Judges would ensure formal equality: no favoritism would be allowed, and class legislation was unconstitutional.<sup>23</sup> Paternalism, a most insidious sort of favoritism, was anathema.

In 1888, therefore, American citizenship appeared to be a clear concept. There were exceptions, of course, such as Indians.<sup>24</sup> Moreover, distinctions between civil and political rights explained why female citizens could be treated differently in certain spheres.<sup>25</sup> Social rights constituted still another realm, a realm government could not enter.<sup>26</sup> Yet contemporary descriptions of citizenship by late nineteenth century Americans inextricably linked and often equated citizenship with self-sufficiency, manhood, and individualism.

Despite a common assumption that Congress was almost moribund during the last quarter of the nineteenth century, Fuller and his colleagues often confronted legal claims involving federal legislation which Congress enacted despite frequent congressional deadlocks produced by evenly-matched, loyal party alignments, antiquated rules, and the waning of reform impulses following the Panic of 1873 and the Compromise of 1877. Still more legislative activity took place on the state level.<sup>27</sup> This increase in

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States v. Harris, 106 U.S. 699 (1883) with *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Virginia v. Rives*, 100 U.S. 313 (1879); *Ex parte Virginia*, 100 U.S. 339 (1879). The Court was somewhat more willing to allow government intervention in matters concerning the franchise. See, e.g., *Ex parte Yarborough*, 110 U.S. 651 (1884).

21. 109 U.S. 3, 25 (1883).

22. *Santa Clara County v. Southern Pacific Railroad*, 118 U.S. 394 (1886) (dictum); *Pembina Mining Co. v. Pennsylvania*, 125 U.S. 181 (1888) (holding that corporation was a person for purposes of fourteenth amendment).

23. See, e.g., *Missouri v. Lewis*, 101 U.S. 22 (1879); *Barbier v. Connolly*, 113 U.S. 27 (1885). For a most useful treatment of the implications of this theme, see Richard S. Kay, 'The Equal Protection Clause in the Supreme Court, 1873-1903', 29 *Buffalo Law Review* 667 (1980). Its ramifications in the realm of due process are somewhat better known. See generally C. Jacobs, *Law Writers and the Courts*, supra note 7.

24. *Elk v. Williams*, 112 U.S. 94 (1884).

25. See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1875); *Bradwell v. State*, 83 U.S. (15 Wall.) 130 (1872).

26. *Civil Rights Cases* 109 U.S. 3, 24 (1883), in which the Supreme Court declared that 'it would be running the slavery argument into the ground' to hold that the thirteenth amendment guaranteed non-discriminatory practices in public theaters, hotels and the like.

27. See, e.g., Loren P. Beth, *The Development of the American Constitution*, supra note

legislation combined with other factors to undermine the monochromatic vision of citizenship. Nevertheless, the idealized American citizen, able to care for himself, remained a pervasive image.

Indeed, in 1889 Lord Bryce reported in *The American Commonwealth* that 'so far as there can be said to be any theory on the subject in a land which gets on without theories, *laissez aller* is the orthodox and accepted doctrine in the sphere both of Federal and State legislation'.<sup>28</sup> Yet Bryce emphasized the total inaccuracy of this theory. He wrote: 'Nevertheless the belief is groundless. The new democracies of America are just as eager for state interference as the democracy of England, and try their experiments with even more light-hearted promptitude.'<sup>29</sup> Though in many respects Americans tolerated legislative interference with personal autonomy more than did their English counterparts, Bryce observed that 'few but lawyers and economists have yet become aware of it, and the lamentations with which old-fashioned English thinkers accompany the march of legislation are in America scarcely heard and wholly unheeded'.<sup>30</sup> But American judges were poised to listen, to hear, and to react to their own lamentations and to do so with authority and an American accent.

We now know that there was a large gap between lawyerly exhortations to avoid paternalism and the willingness of judges to resist legislative interventions on behalf of the citizenry. Moreover, the most striking pronouncements invalidating protective legislation were concentrated in state courts.<sup>31</sup> Recent scholarship suggests that even Justice Stephen J. Field occasionally rejected *laissez-faire* in the 1880s and 1890s, and that Justice David Brewer was not such a totally doctrinaire fellow after all.<sup>32</sup> We also have begun to recognize that realist roots can be found even within the

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11; David J. Rothman, *Politics and Power* (Cambridge, 1966); R. Hal Williams, *Years of Decision*, supra note 19; Morton Keller, *Affairs of State*, supra note 19.

28. James Bryce, *The American Commonwealth* 3 vols. (London, 1889) ii: 408.

29. *Ibid.* at 409. Bryce supplied charts and summaries of 'recent legislation tending to extol state intervention and the scope of the penal law' to prove that Americans spoke one way and acted quite another concerning government intervention.

30. *Ibid.* at 410.

31. See generally Clyde E. Jacobs, *Law Writers and the Courts*, supra note 7; Roscoe Pound, 'Liberty of Contract', 18 *Yale Law Journal* 454 (1909).

32. Field was 'the doyen of conservatives on the postwar Court', according to Morton Keller, *Affairs of State* supra note 19 at 366, but even Field has been 'rehabilitated' somewhat—if one favors government intervention—in Charles W. McCurdy, 'Justice Field and the Jurisprudence of Government-Business Relations,' supra note 7. Field's nephew, Justice Brewer, also has had recent defenders. See, e.g., John E. Semonche, *Charting the Future*, supra note 7 at 168–79, 244–45; Robert E. Garner, 'Justice Brewer and Substantive Due Process: A Conservative Court Revisited', 18 *Vanderbilt Law Review* 615 (1965). Useful additional recent studies of the period include W. Nelson, *The Roots of American Bureaucracy, 1830–1900* (1982); David P. Currie, 'The Constitution in the Supreme Court: The Protection of Economic Interests, 1889–1910', supra note 4; and Walter F. Pratt, 'Rhetorical Styles in the Fuller Court', supra note 13.

bedrock of High Formalism; now it also appears that a prophetic iconoclast such as Justice Oliver Wendell Holmes, Jr. had his formal moments.<sup>33</sup>

Yet so many judges wrote so vigorously on the imminent danger of the loss of American individualism and the evils of rampant paternalism from the Gilded Age through the 1920s that it is difficult to choose the best illustration. My favorite is a West Virginia Supreme Court decision, *State v. Goodwill*,<sup>34</sup> which invalidated a state law requiring mine and factory owners to pay workers in legal currency rather than scrip. Such statutory interference with the poor man's patrimony, his right to choose how to contract for his own labor, was held to violate 'the essential distinction between freedom and slavery; between liberty and oppression'.<sup>35</sup> This preoccupation with slavery, combined with the assumption of a clearcut binary choice between slavery and freedom, is typical of the period.<sup>36</sup> Moreover, according to the Court's president, Judge Snyder, such 'sumptuary legislation' had been 'universally condemned' and recognized as

an attempt to degrade the intelligence, virtue, and manhood of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a knave, and the laborer an imbecile.<sup>37</sup>

33. See, e.g., Walton H. Hamilton, 'On Dating Mr. Justice Holmes', 9 *University of Chicago Law Review* 1, 10, 15, 26–29 (1941); Yosai Rogat, 'Mr. Justice Holmes: A Dissenting Opinion', 15 *Stanford Law Review* 3, 254 (1962–63); Yosai Rogat and James M. O'Fallon, 'Mr. Justice Holmes: A Dissenting Opinion—The Speech Cases', 36 *Stanford Law Review* 1349 (1984); Saul Touster, 'Holmes a Hundred Years Ago: The Common Law and Legal Theory', 10 *Hofstra Law Review* 673 (1982); Robert W. Gordon, 'Holmes's *Common Law* as Legal and Social Science', *supra* note 10; Grant Gilmore, *The Ages of American Law*, *supra* note 6 at 48–56. See also Herman Belz, 'The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship', 13 *American Journal of Legal History* 110 (1969).

34. 33 W. Va. 179 (1889).

35. *Ibid.* at 183.

36. For example, Eugene V. Debs constantly instructed workers that they actually were wage slaves, perhaps not as well off as slaves had been in the South. See, e.g., Bernard J. Brommel, *Eugene V. Debs* (Chicago, 1978) 49, 61–63, 80. Similarly, Upton Sinclair was commissioned to do a study of wage slavery in the meatpacking industry, resulting in *The Jungle* (1906). For similar concern about slavery, from a very different perspective, see generally Arnold M. Paul, *Conservative Crisis and the Rule of Law: Attitudes of Bar and Bench, 1887–1895* (Ithaca, 1960). In this way, the rhetoric of the period was reminiscent of the tone of the American Revolution. See Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, 1967).

37. *State v. Goodwill*, 33 W. Va. 179, 186 (1889). To illustrate 'universal condemnation', Snyder relied on *Godcharles v. Wigeman*, 113 Pa. 431 (1886) which found Pennsylvania's similar statute to be 'utterly unconstitutional and void' since it was 'an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States'. Snyder also cited *Millett v. Illinois*, 117 Ill. 294 (1886), which invalidated legislation requiring owners to weigh coal fairly and pay miners accordingly. Snyder could have cited many other contemporary decisions. See generally Twiss, *Lawyers and the Constitution*, *supra* note 7.

Such regulation interfered with the 'natural law of supply and demand', Snyder asserted, and was an effort to have the government 'do for its people what they can do for themselves'.<sup>38</sup>

The United States Supreme Court never went quite as far as the West Virginia Court in denouncing legislative efforts to protect the populace. Even the well-known statements of Justice Brewer, for example, who wrote that, '[t]he paternal theory of government is to me odious', and that 'Edward Bellamy's *Looking Backward* was in fact nearer than a dream', tended to be in dissent.<sup>39</sup> The more dramatic exclamations by the Justices usually were delivered in speeches off the bench.<sup>40</sup> Nevertheless, in the relatively obscure decisions I will consider, Brewer and his fellow Justices did a great deal both in their reasoning and their results to suggest that there is something to the stereotyped view of the Supreme Court as a bastion of laissez-faire ideology.<sup>41</sup>

Two forgotten 1890 decisions provide a good introduction to the Fuller Court's inconsistency between its proclamations and its actions concerning paternalism. In opinions written by Brewer, a unanimous court upheld two convictions for desertion from the Army. One case involved someone too young to enlist and the other a man too old. Brewer argued that a contract to join the Army changed an individual's status and that his new status became irreversible.<sup>42</sup> In *In re Morrissey*, a *habeas corpus* petition alleged that a seventeen year-old enlisted without his mother's consent, although her consent clearly was required by federal statute. Brewer reasoned that the statutory provision was 'for the benefit of the parent', and therefore 'the

38. Ibid. at 184.

39. Both statements by Justice Brewer were in his dissent in *Budd v. New York*, 143 U.S. 517, 551 (1892). Brewer also insisted that New York went too far in regulating prices at a grain elevator, because '[t]he utmost possible liberty to the individual and the fullest protection to him and his property is both the limitation and duty of government'. Ibid. at 551. Rufus Peckham, who was soon to join the U.S. Supreme Court, had much the same thing to say for the New York Court of Appeals in the *Budd* case.

40. See, e.g., the speeches by Field, Brewer and Brown discussed in Arnold M. Paul, *Conservative Crisis and the Rule of Law*, supra note 38 at 63–64, 70–72, 84–85. See also John Chipman Gray's attack on paternalism and socialism, which Gray saw exemplified in the spendthrift trust, discussed in Gregory S. Alexander, 'The Dead Hand and the Law of Trusts in the Nineteenth Century', 37 *Stanford Law Review* 1189, 1244–47 (1985).

41. Charles Warren found overwhelming evidence that *Lochner* was atypical. Charles Warren, 'The Progressiveness of the United States Supreme Court', 13 *Columbia Law Review* 294, 295 (1913). See supra note 12. For a very different view, see Roscoe Pound, 'Law in Books and Law in Action', 44 *American Law Review* 12 (1910).

42. This idea of status created by contract evokes feudalism and rather starkly reverses Sir Henry Maine's famous aphorism. Henry Sumner Maine, *Ancient Law* (London, 5th ed. 1873) 165.

statute simply gives no privilege to the minor'.<sup>43</sup> In *In re Grimley*, Brewer reversed two lower courts that had granted *habeas* relief to a forty year-old Irish immigrant who never actually served in the Army and who enlisted without appropriate procedures, but who still faced a six month sentence for desertion.<sup>44</sup> Grimley was well over the statutory maximum age when he enlisted, and he had immediately changed his mind about the army in response to entreaties from his grief-stricken mother. Brewer responded with a revealing hypothetical from the formal law of contract he found 'worthy of notice'.<sup>45</sup> Suppose, Brewer argued, 'B' lied about his identity in order to contract with 'A', after A had advertised for 'a person of Anglo-Saxon descent'.<sup>46</sup> It was obvious and analogous, said Brewer, that 'where a party is *sui juris*, without any disability to enter into the new relation',<sup>47</sup> his contract for enlistment became a one way street, benefiting the government. Therefore, neither B, who lied about his race in Brewer's hypothetical, nor poor old Grimley, could revoke.

Once the parties agreed to a contract, therefore, iron legal rules assured enforcement. The *Grimley* and *Morrissey* decisions were not much noticed. Yet their interstitial pronouncements are illuminating, and quite consistent with laissez-faire values, even as they demonstrate the familiar but odd connection between reverence for individual autonomy and the great deference accorded to both the objective legitimacy of legal rules and the power of the military arm of the federal government.

Some of the most striking decisions of the Fuller Court comport with this formalistic approach. In upholding the exclusion of Chinese aliens, for example, despite obvious abrogation of treaty obligations and blatant procedural abuses, the Court explicitly accorded Congress unbounded power.<sup>48</sup> Similarly, Justice Brewer invoked the broadest kind of inherent federal power to meet 'the duty to secure rights to all citizens' by validating President Cleveland's use of 'the strong arm' of federal troops to put down

43. *In re Morrissey*, 137 U.S. 157, 199 (1890). William Howard Taft signed the briefs as U.S. Solicitor General.

44. *In re Grimley*, 137 U.S. 147 (1890).

45. *Ibid.* at 150.

46. *Ibid.* at 151.

47. *Ibid.* at 153.

48. Congress first acted to exclude the Chinese in 1882. Its power to do so was upheld in *Chae Chan Ping v. United States*, 130 U.S. 581 (1889). The Court afforded Congress unqualified discretion in upholding the Geary Act of May 5, 1892 in *Fong Yue Ting v. United States*, 149 U.S. 698 (1893). Brewer, Field and Fuller dissented and Brewer's dissent, while showing little sympathy for 'the obnoxious Chinese', is a good example of his penchant for arguing that questions of degree provided an impermissible basis for legislation. *Ibid.* at 742. But see *United States v. Wong Kim Ark*, 169 U.S. 649 (1898). See generally Robert McClellan, *The Heathen Chinese* (Columbus, 1971); Charles J. McClain, Jr., 'The Chinese Struggle for Civil Rights in 19th-Century America: The Unusual Case of *Baldwin v. Franks*', *Law and History Review* 3 (1985) 349.

the Pullman strike of 1894.<sup>49</sup> It was Justice Peckham who stretched inherent national power to the point that it supported the President's authority to condemn private property in order to preserve the Gettysburg battlefield.<sup>50</sup> Within three years of its restrictive decision in *United States v. E.C. Knight Co.*,<sup>51</sup> the Court referred to notions of inherent power and obligation derived from morality and honor to sustain congressional power to pay price supports for sugar.<sup>52</sup>

The Court was far less bold, however, in its construction of the thirteenth amendment, and in its interpretation of federal power in statutes premised upon the enforcement section of that amendment. The Court's explanations for its restrictive approach relate directly to the issue of whether protection inevitably involves disability.

## II. Paternal Consideration: Action and Inaction

Before I consider thirteenth amendment challenges to Draconian enforcement of contract law in cases not explicitly concerned with race, several aspects of *Plessy v. Ferguson*<sup>53</sup> merit consideration. These generally are overlooked amid outrage at the equal protection language and holding in *Plessy* that legitimized deference to racial classifications.

Homer Plessy had attacked Louisiana's law separating the races on streetcars because, he claimed, that law imposed a badge of slavery forbidden by the thirteenth amendment. Rejecting his claim, Justice Henry B. Brown explained that any stigma involved in the required separation was entirely in the eyes of the beholder. Brown also asserted that it was 'too clear for argument' that the thirteenth amendment abolished nothing but slavery, bondage, and at least 'the control of the labor and services of one man for the benefit of another, and the absence of a legal right to the disposal of his own person, property and services'.<sup>54</sup> Obviously, this definition of servitude

49. *In re Debs*, 158 U.S. 564, 586, 582 (1895). The position ultimately vindicated in the *Debs* case, of course, was that of George Pullman, whose relations with his workers in his town of Pullman, Illinois may have made him the foremost paternalist of the day.

50. *United States v. Gettysburg Electric Railway*, 160 U.S. 688 (1896).

51. 156 U.S. 1 (1895). As constitutional law students still learn, the Court attempted to draw an impossible line between manufacturing and commerce, and thereby determined that Congress could not reach the Sugar Trust, though it controlled 98% of the nation's sugar.

52. *United States v. Realty Co.*, 163 U.S. 427 (1896). For additional illustrations of judicial willingness to uphold broad national power, see, e.g., *South Carolina v. United States*, 199 U.S. 437 (1905) (upholding federal tax of state agent selling alcoholic beverages); *McCray v. United States*, 195 U.S. 27 (1904) (upholding statute prohibiting coloring oleomargarine to resemble butter).

53. 163 U.S. 537 (1896).

54. *Ibid.* at 542.

might be expanded or contracted in future decisions, but it is noteworthy that even in *Plessy* the Court conceded that the thirteenth amendment could forbid at least some coercive labor contracts.

In explaining why the fourteenth amendment's goal—'undoubtedly to enforce the absolute equality of the two races before the law'<sup>55</sup>—did not reach segregated public transportation, Brown may well have relished the opportunity to invoke a famous Massachusetts decision by Chief Justice Lemuel Shaw. Born in Massachusetts himself, Brown explained that *Roberts v. City of Boston*<sup>56</sup> came from a state 'where the political rights of the colored race have been longest and most earnestly endorsed'.<sup>57</sup> Yet Shaw had written:

But, when this great principle [of equal protection] comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion, that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security.<sup>58</sup>

It is likely that the *Plessy* majority neither detected any irony in, nor intended to affirm, Shaw's sentiment that the 'rights of all' are 'equally entitled to paternal consideration'. Yet C. Vann Woodward may not have exaggerated when he termed the bridge between the opinions of Shaw and Brown 'the most fascinating paradox in American jurisprudence'.<sup>59</sup> For our

55. *Ibid.* at 544.

56. *Ibid.*, quoting 59 Mass. (5 Cush.) 198, 209–10 (1849).

57. *Ibid.*

58. *Ibid.* (emphasis added). For a discussion of the *Roberts* case, see Leonard W. Levy, *The Law of the Commonwealth and Chief Justice Shaw* (Cambridge, 1957) 109–17. The positive flavor of Shaw's reference to 'paternal consideration and protection of the law' had been transmuted over the ensuing half century. By 1896, paternalism was anathema. In private law, however, remnants of the old affirmative aspects of paternal consideration survived. A good and revealing example appears in a fairly typical summation of the Law of Persons by Brigadier General Norman L. Lieber, son of the first famous American jurist, Francis Lieber, in 'The Supreme Court on the Military Status', 31 *American Law Review* 342, 353 (1897). Lieber wrote:

The *status* of a person is his legal position or condition . . . . The term is chiefly applied to persons under disability, or persons who have some peculiar condition which prevents the general law from applying to them in the same way as it does to ordinary persons. The question of status is of importance in jurisprudence, because it is generally treated as a basis for the classification of law, according as it applies to ordinary persons (general law, normal law, law of things), or to persons having a status, i.e., a disability or peculiar legal condition, such as infants, married women, lunatics, convicts, bankrupts, aliens, public officers, etc. (particular law, abnormal law, law of persons).

59. C. Vann Woodward, 'The Case of the Louisiana Traveler', in John A. Garraty, ed., *Quarrels That Have Shaped the Constitution* (New York, 1975) 145, 155.

purposes, that paradox connects Shaw's apparent endorsement of paternalism and Brown's abhorrence of the possible use of federal constitutional principles against folkways.

*Robertson v. Baldwin: Protecting Sailors*

Within a year of *Plessy*, in another case involving the thirteenth amendment, Brown again wrote for the Court over a vigorous dissent by John M. Harlan. In *Robertson v. Baldwin*,<sup>60</sup> three white seamen challenged an 1872 federal statute under which they were detained for deserting ship and for not following orders.<sup>61</sup> From the 'somewhat meager'<sup>62</sup> record, it appeared that the men signed shipping orders for an overseas voyage of uncertain destination. When they abandoned ship, an Oregon justice of the peace imprisoned them for sixteen days until the *Arago* was again ready to sail. Then, when the trio refused an order to 'turn to', the three were charged with refusing to work and a federal marshal imprisoned them in San Francisco.

Seeking release through *habeas corpus*, the seamen claimed that the two periods of confinement amounted to enforcement of involuntary servitude. The Court's holding was that the seamen, who voluntarily signed shipping orders, could not complain that their service had become involuntary. The thirteenth amendment did not interfere with an individual's freedom to 'contract for the surrender of his personal liberty for a definite time and for a recognized purpose',<sup>63</sup> even if it meant subordinating his will. Brown used a vast array of historical sources—a veritable *tour de force* of the worst kind of law office history—to prove that imprisonment was merely a modern example of the time-honored legal tradition of protecting sailors from themselves. Brown explained this ancient, abiding paternalistic commitment as follows:

Seamen are treated by Congress . . . as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.<sup>64</sup>

In fact, Brown went so far as to assert that '[t]he ancient characterization of seamen as "wards of admiralty" is even more accurate now than it was formerly'.<sup>65</sup>

60. 165 U.S. 275 (1897).

61. The Shipping Commissioners' Act of 1872, 17 Stat. 243.

62. *Robertson*, 165 U.S. at 276 (1897).

63. *Ibid.* at 280.

64. *Ibid.* at 287. In the course of his historic essay, Brown drew from the ancient Rhodians through the Rules of Oleron promulgated during the reign of Henry III to French, German and Dutch law. What he omitted, however, was that the then-current law of England apparently would not have permitted the imprisonment at issue. Additionally, the American law from 1790 to 1872 also made no such provision. Finally, one of the essential preconditions in many of his examples—knowledge of the duration and destination of the voyage—was not present in *Robertson v. Baldwin*.

65. *Ibid.* at 287.



Still, Brown did not reach the extreme position of Solicitor General Holmes Conrad, who argued that, like soldiers, seamen 'cease to be independent, separate and distinct beings'<sup>66</sup> once they contract for service. They change their status, he asserted, and become mere 'integers' and 'parts of a machine'.<sup>67</sup> Yet Brown chose to celebrate the 1872 amendments that added imprisonment to the 1790 Seaman's Act; he considered these provisions to be legislation designed to protect seamen 'as far as possible, against the consequences of their own ignorance and improvidence'.<sup>68</sup>

In his scathing dissent, Harlan foresaw advertisements for fugitive seamen replicating those for fugitive slaves. He dismissed Brown's historical citations as products of earlier times 'when no account was taken of man as man'.<sup>69</sup> Harlan said the thirteenth amendment forbade any compulsion to serve another in private business. He agreed that seamen were generally ignorant and improvident, but argued that this compelled increased solicitude by courts. Harlan sharply rejected the idea that protecting seamen could include the use of force to compel seamen to render personal service.<sup>70</sup> In *Robertson v. Baldwin*, one man's version of needed protection proved to be another's idea of involuntary servitude; the distinction made a constitutional difference.

### *Indian Wards*

American Indians traditionally presented a special case for paternalism. The crux of the Reservation Indian problem, according to Harvard Law School's James Bradley Thayer, was that Indians were 'A People Without Law'.<sup>71</sup>

In two *Atlantic Monthly* articles in 1891, Thayer provided a compelling review of abuses and misconceived attempts at Indian aid. He stressed that the federal government now owed an affirmative duty to the Indians and

66. Brief for Appellee at 10, *Robertson*.

67. *Ibid.*

68. *Robertson*, 165 U.S. at 293 (1897).

69. *Ibid.* at 303.

70. By the end of 1898, Congress had adopted Harlan's views in the White Act, which eliminated all imprisonment for desertion, except for a one-month maximum for desertion in foreign ports not vigorously opposed by the sailors' unions, and regulated the seaman's diet and the contract allotment system with great specificity. 55th Congress, 3d Sess., 30 Stat. 755 (1898). See also *Patterson v. Bark Eudora*, 190 U.S. 169 (1903). I benefited a great deal from an excellent paper by Ronnie Sussmann about *Robertson v. Baldwin* and earlier cases involving sailors and their 'care' (unpublished manuscript, 1982).

71. This is the title of two articles Thayer wrote in *Atlantic Monthly* 540 and 676 (Oct., Nov. 1891). But see, e.g., K.N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way*, (Norman, 1941); *Talton v. Mayes*, 163 U.S. 376 (1896); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

insisted that 'the mere neglect or refusal to act is itself action, and action of the worst kind'.<sup>72</sup>

The Supreme Court had acknowledged the mess Thayer described even before Fuller arrived. In *United States v. Kagama*, for example, Justice Gray emphasized the extreme dependence of Indian tribes on the federal government, the problem of local hostility, and the great extent to which the 'very weakness and helplessness' of the Indians was itself 'due to the course of dealing of the federal government with them'.<sup>73</sup>

The Fuller and White courts wrestled and lost many bouts with the need to define the 'duty of protection' endorsed by Thayer and Gray. Matters were complicated further by the Dawes Severalty Act of 1887, which was premised on the assumption that in their tribal units the Indians lacked the 'selfishness which is at the bottom of civilization'.<sup>74</sup> The Severalty Act attempted to use Congress's absolute control over Indian affairs to force individual property holding by breaking up the tribes and allotting their land to be held in trust by the federal government. It produced dozens of Supreme Court decisions further clouding the issue of Indian status. The Court often changed direction, in part because the Justices struggled constantly to maintain a vision of completely separate spheres of state and federal sovereignty.<sup>75</sup>

The only Indian case that I have found which raised a thirteenth amendment claim, however, was *United States v. Choctaw Nation*.<sup>76</sup> This strange controversy was the culmination of forty years of dispute between the federal government, several tribes, and their former black slaves. The

72. Ibid. at 678.

73. 118 U.S. 375, 383–84 (1886). In *Kagama* protection concerned federal jurisdiction over seven major crimes, when committed on Indian reservations.

74. Dawes is quoted in A. Debo, *And Still the Waters Run* 21–22 (1940). Upon returning from a visit to the Cherokee nation in 1886, Dawes noted that there was not a pauper in the nation and the nation owed no debts. They had schools and hospitals. 'Yet the defect of the system was apparent . . . [T]here is no enterprise to make your home any better than that of your neighbors'.

75. Perhaps the most revealing decision concerning the Severalty Act was an opinion written by Justice Brewer, *In re Heff*, 197 U.S. 488 (1905). Brewer used the tenth amendment to hold that Congress could not regulate the sale of liquor to a former member of the Kickapoo tribe who was now an allottee. He stated that Congress 'is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned'. Ibid. at 499. See generally Robert M. Utley, *The Indian Frontier of the American West 1846–1890* (Albuquerque, 1984); Russel L. Barsh and James Y. Henderson, *The Road: Indian Tribes and Political Liberty* (Berkeley, 1980); Wilcomb E. Washburn, *Red Man's Land/White Man's Law* (New York, 1970); Daniel F. Littlefield, *The Cherokee Freedman* (Westport, 1978). I benefited a great deal from an excellent paper by Despena Lee Fillios on Heff and related matters (unpublished manuscript, 1980).

76. 193 U.S. 115 (1904).

Choctaw and Chickasaw joined the Confederate side in the Civil War. When the tribes signed treaties with the federal government in 1866, they agreed not only to free their slaves, but also to give them the option of being adopted and, thereby, of sharing the rights of tribe members, including suffrage and forty acres of land each. The United States was to hold \$300,000 in trust and to subtract payments to freed slaves who opted to leave the reservations rather than to join the tribes.

The Choctaw themselves had been before the Court in 1886, arguing that a formal release which they had signed and which purportedly waived federal treaty obligations dating from Andrew Jackson's presidency could not be binding, since the Choctaw signed under the duress of dire necessity. Plaintiffs' attorney Samuel Shellabarger cited several Supreme Court decisions to support the idea that, under such circumstances, legal formalities would yield to equitable considerations.<sup>77</sup> The federal government's brief responded that forcing the Indians to remove across the Mississippi in violation of the earlier agreement was prompted not by 'lust of territory' but rather by 'a sincere desire to accomplish what was best for the Indian and the white man, by eliminating the disturbing element that would live in savagery, and planting it where it would be untrammelled by even the proximity of civilization, neither molesting nor being molested'.<sup>78</sup>

In deciding that 1886 case, the Supreme Court noted that the relation of the federal government to the Choctaw was one 'between a superior and inferior, whereby the latter is placed under the care and control of the former'.<sup>79</sup> The United States owed Indians 'care and protection'. Accordingly, the Court abjured the 'technical rules' that would use the release the Indians signed to defeat their claims and relied instead on 'that larger reason which constitutes the spirit of the law of nations'.<sup>80</sup>

Now, in 1904, former black slaves and their descendants were before the Court, trying to hold the Choctaws to treaty obligations. The federal government took the side of the blacks, but sought only to purchase land for them with the \$300,000, and did not claim that the United States had fulfilled its part of the treaty.

In a brief opinion for a unanimous Court, Justice McKenna held that the

77. Brief for Appellant at 88–99, *Choctaw Nation v. U.S.*, 119 U.S. 1 (1886). The cases ranged from *Russell v. Southard*, 53 U.S. (12 How.) 139 (1851) to *Graffam v. Burgess*, 117 U.S. 180 (1886).

78. Brief for Appellee at 4, *Choctaw Nation v. U.S.*, 119 U.S. 1 (1886). See generally *ibid.* at 2–10 for astonishing statements about General Jackson's knowledge of and solicitude for the Indians, and the general theme that they were lucky not to have been massacred, so they should not complain. See also M. Rogin, *Fathers & Children* (1975).

79. *Choctaw Nation v. U.S.*, 119 U.S. 1, 28 (1886).

80. *Ibid.* The Court held that a Senate award to Indians as compensation for land taken by the federal government was not conclusive, but would be given *prima facie* effect to establish the validity of Indian claims in the Court of Claims, authorized by an 1881 statute. This seems one of the rare occasions when even a credible claim could be made that a Great Spirit of any description sided with the Indians in court during the period.

tribes need not offer the adoption option. The Court readily agreed to the freedmen's claim that the Emancipation Proclamation and the thirteenth amendment freed them and gave them 'all the rights of freedmen'.<sup>81</sup> McKenna then asked, '[W]hat is its consequence?'<sup>82</sup> The Court thought the obvious answer was 'certainly not to invest the freedmen with any rights in the property, or to participate in the affairs, of their former owners'.<sup>83</sup> Replying to the freedmen's fallback claim to the \$300,000 trust fund, the Court stated that the fund was only for those freedmen who left the tribe, and none had done so. Although neither the Indians nor the United States had obeyed the treaty, the freedmen had no rights beyond formal emancipation from slavery.

This result illustrates rule-boundedness run riot. It is almost a parody. Because no one followed the rules, the Court reasoned, the blacks who were least well off necessarily should be left in that position. No other rules could be found. If the freedmen wished a different result, they should have used the appropriate legal forms. As a constitutional matter, in the context of broken promises all around, the 'declaration of universal freedom'<sup>84</sup> proclaimed by the thirteenth amendment was interpreted to mean freedom only from formal, coercive bondage.

### **III. The Perils of Full Citizenship: Contracts and Peonage**

Black citizens soon were sent this message of a restrictive interpretation of the thirteenth amendment even more emphatically. Unlike Indians, who occupied a kind of never-never land as permanent wards of the government, blacks were formally full legal citizens. They often were told that they should use democratic processes to change things if they wished and that they should not expect judicial intervention on their behalf.<sup>85</sup>

Peonage prosecutions offer a good example. Despite decisions gutting Reconstruction statutes in the 1870s and 1880s, and actions by Congress to repeal most surviving statutes in 1894, several federal peonage statutes still remained. Prosecutions based on these statutes, premised on thirteenth amendment power, suddenly sprang up around 1900 in the volatile southern political climate accompanying the rise of the single-party system. The story

81. *U.S. v. The Choctaw Nation and The Chickasaw Nation*, 193 U.S. 115, 124 (1904).

82. *Ibid.*

83. *Ibid.*

84. *Civil Rights Cases*, 109 U.S. 3, 20–21 (1883).

85. See, e.g., *Williams v. Mississippi*, 170 U.S. 213 (1898); *Brownfield v. S. Carolina*, 189 U.S. 426 (1903) (Holmes's first opinion on the U.S. Supreme Court); *Giles v. Harris*, 189 U.S. 475 (1903), in which Holmes told the black plaintiffs complaining of disfranchisement that 'relief from a great political wrong, if done . . . must be given by [the people of the State] or by the legislative and political department of the government of the United States'. *Ibid.* at 488.

is told well elsewhere,<sup>86</sup> so I will mention only briefly the Supreme Court's manipulation of thirteenth amendment doctrine in 1905–1906, narrowing the reach of the criminal peonage statute to such a fine point that even had prosecutors been angelic, they could hardly dance their prosecutorial dances upon it.

In *Clyatt v. United States*,<sup>87</sup> the Court overturned one of the few successful peonage prosecutions. Justice Brewer upset the conviction of a brutal white overseer in the southern Georgia and Florida turpentine farms. Although unwilling to accept the extreme states' rights construction of the thirteenth amendment advanced by Senator Bacon and Congressman Brantley on behalf of the defendants, the Court refused to define peonage more broadly than as 'a status or condition of compulsory service, based upon the indebtedness of the peon to the master'.<sup>88</sup> Brewer emphasized that debt was the necessary 'basal' condition.<sup>89</sup> Though one might contract to become a peon voluntarily, Brewer conceded, 'a clear distinction exists between peonage and the voluntary performance of labor or rendering services in payment of a debt'.<sup>90</sup> Justice Harlan, dissenting, found it 'going very far', in a case 'disclosing barbarities of the worst kind against these negroes',<sup>91</sup> to hold that the trial court erred in letting the case go to the jury.

*Clyatt* was a clear 'go slow' message to the prosecutors, judges, and victims trying to reform the southern peonage system. Though the Supreme Court was unwilling to abrogate the thirteenth amendment entirely, as the construction proposed by *Clyatt*'s lawyers had suggested, the call for restraint in *Clyatt* grew louder the following term in *Hodges v. United States*.<sup>92</sup>

Hodges and two co-defendants were convicted and sentenced to the statutory maximum for their role in a mob effort to intimidate eight blacks into leaving their jobs at an Arkansas lumber mill. Brewer again wrote for the Court, but now he embraced a strong states' rights argument and merged it with the notion that the thirteenth amendment was 'not an attempt to

86. For peonage, see, e.g., Pete Daniel, *The Shadow of Slavery* (Urbana, 1972); Daniel A. Novak, *The Wheel of Servitude* (Lexington, 1978); Benno C. Schmidt, 'Principle and Prejudice: The Supreme Court and Race in the Progressive Era. Part 2: The Peonage Cases', 82 *Columbia Law Review* 646 (1982). For southern politics, see, e.g., J. Morgan Kousser, *The Shaping of Southern Politics, 1880–1910* (New Haven, 1974); Sheldon Hackney, *Populism to Progressivism in Alabama* (Princeton, 1969); C. Vann Woodward, *The Strange Career of Jim Crow* (New York, 2d rev. ed. 1966).

87. 197 U.S. 207 (1905).

88. *Ibid.* at 215.

89. *Ibid.*

90. *Ibid.*

91. *Ibid.* at 233.

92. 203 U.S. 1 (1906).

commit [blacks] to the care of the Nation'.<sup>93</sup> Rejecting the argument that harassment of black workers was a badge or vestige of slavery, Brewer remanded them to Arkansas law for redress. To do otherwise, Brewer stated, would be to treat blacks as 'wards of the Nation'.<sup>94</sup> Such a paternalistic approach was rejected, he explained, because at the end of the Civil War, Congress decided to grant blacks citizenship, on the assumption that 'thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the States where they should make their homes'.<sup>95</sup>

This construction of the Civil War Amendments was a stark proclamation of the 'equal chance in the race of life' approach. It flowed naturally from the Court's distaste for national government intervention. It also reflected the Court's failure to take account of the brutal facts emerging from studies and muckraking articles about the labor system in the South. Once again Justice Harlan wrote in dissent to argue the inconsistency in the Court's announced belief in the liberty of contract; he pointed to the anomaly of ignoring the pleas for '[n]ational protection' by 'millions of citizen-laborers of African descent',<sup>96</sup> who were denied what he viewed as their right to earn a lawful living solely because of their race. This failure to protect, Harlan proclaimed, betrayed the thirteenth amendment promise, which 'destroyed slavery and all its incidents and badges, and established freedom'<sup>97</sup> and had 'an affirmative operation the moment it was adopted'.<sup>98</sup>

The *Hodges* decision is less well known than *Clyatt* and the *Bailey v. Alabama*<sup>99</sup> decision which followed, but *Hodges* provides a clear demonstration of the paradox of paternalism. To protect blacks, it was argued, invariably was to disable them. In the majority's view, to give blacks the special protection of national laws was to treat them as wards and, in the long run, to undermine their chances of successful competition with all other citizens. Notions of federalism entered the equation, of course, but the Court's central thrust was to sustain an ideal form of unified citizenship and to command formal equality for all. In opposing this position, Harlan took something of a realist's view of the social and political position of blacks. He claimed, in effect, that blacks could and should be treated as special.

93. *Ibid.* at 16. Brewer reasoned that since the thirteenth amendment reached all persons, and since Chinese laborers now had to carry certificates as free Negroes did during slavery, the thirteenth amendment could not affect wrongs to persons not shown in the record to be slaves or the descendants of slaves. State law was said to be the place to go to seek remedies.

94. *Ibid.* at 20.

95. *Ibid.*

96. *Ibid.* at 37. This time Harlan was joined in dissent by Day.

97. *Ibid.* at 27.

98. *Ibid.* at 29.

99. 219 U.S. 219 (1911).

Ironically, Harlan's *Hodges* dissent also rested firmly on the very precedents which allowed the Court to 'Lochnerize' on behalf of a particular judicial vision of freedom of contract.

Within the next few years, the Court's majorities showed some willingness to limit the *Lochner* approach. The best-known example was *Muller v. Oregon*,<sup>100</sup> upholding Oregon's limitation of the number of hours women could work in laundries. *Muller* is famous for the Court's nod toward the facts marshalled by Louis D. Brandeis and June Goldmark in a brief in defense of the statute, but it more recently has become something of a target in debates over sex discrimination. Justice Brewer's majority opinion rested on factual assumptions that women were naturally 'at a disadvantage in the race for subsistence' and therefore 'not upon an equality' with men.<sup>101</sup> To Brewer and the majority, it was natural to treat women paternalistically. Unlike blacks, women were not to be considered equals in life's natural struggles.

*Muller*'s legally permissible paternalism by a state contrasted sharply with several contemporaneous holdings severely limiting the power of Congress to regulate employment relationships.<sup>102</sup> The Court also sent back to the lower court an attempt by a group of progressives, covertly backed by Booker T. Washington, to challenge Alabama's farm labor system.<sup>103</sup>

When this case, *Bailey v. Alabama*, returned to the Supreme Court in 1911, Bailey's claim of involuntary servitude directly posed the question of how far the thirteenth amendment might go to invalidate a contract that appeared to have been entered into voluntarily. In other words, did the federal Constitution restrict the power of a state to enforce contracts?

Bailey was portrayed as 'a mere pawn' in the reformer's challenge to criminal convictions for breach of a year-long, twelve dollar per month labor contract. Ray Stannard Baker publicized 'the unmistakable marks of ignorance, inertia, irresponsibility' in Bailey's 'dull black face', yet Baker also celebrated Bailey's victory as 'another bar . . . placed in the way of the strong white man who would take advantage of the weaker colored man'.<sup>104</sup>

To Justice Hughes, who wrote for the majority in one of his first Supreme

100. 208 U.S. 412 (1908).

101. *Ibid.* at 421.

102. See, e.g., *Lawlor v. Loewe* (Danbury Hatters' Case), 208 U.S. 274 (1908); *Adair v. United States*, 208 U.S. 161 (1908); *Employers' Liability Cases*, 207 U.S. 463 (1908).

103. *Bailey v. Alabama*, 211 U.S. 452 (1908). Holmes, for the majority over dissents by Harlan and Day, rejected attempts to 'take a short cut' to get the case before the U.S. Supreme Court. *Ibid.* at 455.

104. Ray Stannard Baker, 'A Pawn in the Struggle for Freedom', *American Magazine* 72 (1911) 608, 610. See also the article celebrating the victory in the *New York Age*, January 19, 1911, but also describing Bailey as a 'cipher' who was 'last heard from slinging hash at the clubhouse, caring not which way the winds of the court blew, so they robbed him not of his good meals and freedom to break contracts whenever he listed'.

Court opinions, Alabama's presumption of criminal fraud in the breach of a contract, and its law limiting the defendant's ability to testify about his intent at the time he agreed to the contract, furnished 'an instrument of compulsion, particularly effective as against the poor and ignorant, its most likely victims'.<sup>105</sup> Because the thirteenth amendment 'was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag',<sup>106</sup> it invalidated Alabama's attempt to enforce labor contracts in this way. Hughes stated that the amendment prohibited all 'control by which the personal service of one man is disposed of or coerced for another's benefit'.<sup>107</sup>

Hughes began by insisting that the defendant's race was irrelevant, as was the fact that the contract was made in a southern state. Hughes also said he was unwilling to impute any oppressive intent to anyone in the case. Nevertheless, Alabama's enforcement scheme would make a barren thesis out of 'freedom of labor upon which alone can enduring prosperity be based'.<sup>108</sup> It was therefore invalid.

Holmes, who had not approved of earlier constitutional freedom of contract claims, saw the majority opinion as an encroachment on the power of states to enforce contracts effectively. 'The Thirteenth Amendment does not outlaw contracts for labor',<sup>109</sup> he proclaimed. In fact, Holmes suggested Alabama's scheme actually might aid the laborer, who would suffer because the majority's decision to remove the enforcement mechanism would limit the terms of the bargain a laborer like Bailey could make. Holmes summarized his position as follows:

Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.<sup>110</sup>

Holmes accused the majority of tacitly assuming that Alabama juries would be prejudiced. To the contrary, Holmes suggested, fair juries would sometimes acquit: it was perfectly appropriate for Alabama to leave ambiguous decisions to juries since 'their experience as men of the world'<sup>111</sup> might have taught them that laborers frequently accept advances, work for part of the season, and then go off to other plantations seeking better wages.

105. *Bailey v. Alabama*, 219 U.S. 219, 245 (1911).

106. *Ibid.* at 241.

107. *Ibid.*

108. *Ibid.* at 245.

109. *Ibid.* at 246.

110. *Ibid.* This example of Holmes expostulating about 'wrong conduct' is striking; it contrasts starkly with Holmes's position in *The Common Law* (1881) and with his characteristic enthusiasm for the utility of life's struggles. See, e.g., 'The Soldier's Faith' in Marx DeWolfe Howe, ed., *The Occasional Speeches of Justice Oliver Wendell Holmes* (Cambridge, 1962) 73 and sources cited *supra* notes 33 and 86.

111. *Bailey v. Alabama*, 219 U.S. at 248.



In a sense, Hughes and Holmes agreed that individual freedom of contract was a paramount value. Their real conflict was over the permissible degree of government intervention.<sup>112</sup> Hughes viewed the thirteenth amendment as an 'overdrive', so that both government and individual power over another individual were limited by it. Holmes was much more the formalist, willing to suppose that Alabama juries would be fair and that deference was due the legislature. Hughes adopted a pose of not looking behind the formal categories of the law, but he could not avoid seeing 'poor' and 'ignorant' farm workers<sup>113</sup> in need of the Court's protection, no matter what contracts they might have signed. In a sense, while alleging belief in freedom of labor, Hughes joined Ray Stannard Baker in a directly paternalistic effort to ensure that the Constitution would protect farm laborers from themselves, at least insofar as they signed year-long contracts from which no real escape was possible. Holmes rejected such paternalism, and argued that economics explained how Alabama's enforcement scheme actually could benefit farm laborers.

The Court soon extended its *Bailey* holding to the pervasive, vicious criminal surety system. *United States v. Reynolds*<sup>114</sup> was a carefully arranged test prosecution that challenged an Alabama law allowing employers to pay the fines of people convicted of crimes and then to keep them working until fines and costs were repaid. Alabama defended the system as a humane alternative to the chain gang. The state also alleged the added benefit of leaving the convict free to choose for himself whether he wanted to take part.<sup>115</sup>

The Supreme Court did not find these humanitarian arguments convincing. In fact, Justice Day noted for a unanimous Court that 'the convict is kept chained to an ever-turning wheel of servitude'.<sup>116</sup> Because the convict's service was owed to private parties and not to the state, the thirteenth amendment applied. In a revealing concurrence, Holmes repeated his objections to the *Bailey* decision, but went on to say:

But impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by.<sup>117</sup>

Given this willingness to generalize about an unspecific but obvious class of people unable to endure pain or delay gratification adequately, Holmes

112. For a provocative discussion, see Benno C. Schmidt, 'Principle and Prejudice', *supra* note 86.

113. *Bailey v. Alabama*, 219 U.S. 219 (1911) at 245.

114. 235 U.S. 133 (1914).

115. See Benno C. Schmidt, 'Principle and Prejudice', *supra* note 86 at 691–702.

116. *U.S. v. Reynolds*, 235 U.S. at 146–47.

117. *Ibid.* at 150.

could agree that 'the inevitable' and 'contemplated' outcome of the Alabama laws should be invalidated.<sup>118</sup>

Even the unanimous *Reynolds* decision demonstrated that it was difficult for the Court to determine when an individual's freedom to contract might actually be so constricted as to allow intervention to regulate that freedom. Within a year, the Court extended the *Adair* decision and the *Lochner* approach to the states in *Coppage v. Kansas*,<sup>119</sup> invalidating a Kansas ban on anti-union, 'yellow dog' labor contracts. Freedom of contract remained sufficiently vital to preclude intervention in labor-management affairs, particularly when the state's policy suggested redistribution of wealth or power. Legislation would be struck down as paternalistic when it was perceived to interfere excessively with equality of exploitation.

#### IV. The Thirteenth Amendment Takes a Holiday

Thirteenth amendment challenges to involuntary servitude reached the Court several more times while White was Chief Justice. In the first two cases, individuals challenged traditional forms of forced labor. The Court had little difficulty in affirming Florida's power to use its criminal law to force people who were unable to hire substitutes to work on road crews.<sup>120</sup> Then, against a background of war fever and anti-German hysteria, the Court disposed of a thirteenth amendment challenge to the World War I draft in a single paragraph: White scoffed at the idea of constitutional doubt about the government's power to compel military service.<sup>121</sup>

At the close of the Fuller-White era, it was somehow fitting that property owners were the final litigants to invoke the thirteenth amendment. They did so in a broad attack on post-World War I rent control provisions in New

118. *Ibid.*

119. *Coppage v. Kansas*, 236 U.S. 1 (1915). As Brandeis put it in 'The Living Law', 10 *Illinois Law Review* 461 (1916), 'In the *Coppage Case*, the Supreme Court showed the potency of mental prepossessions'.

120. *Butler v. Perry*, 240 U.S. 328 (1916). Justice McReynolds emphasized the long tradition of mandatory road work. He explained the intention of the thirteenth amendment as follows: 'The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers'. *Ibid.* at 333. Therefore, McReynolds explained for the unanimous Court, the thirteenth amendment certainly did not 'interdict enforcement of those duties which individuals owe to the state, such as service in the army, militia, on the jury, etc.'. *Ibid.* The person objecting to mandatory road work was apparently white, but it had long been clear that thirteenth amendment protections were not limited by race. In fact, one of the test cases in *Hodges* involved a white convict; the Court also indicated that the Civil Rights Act of 1866, premised on the thirteenth amendment power of Congress, could reach a politically-motivated prosecution in a bitter battle among white citizens in Kentucky. *Kentucky v. Powers*, 201 U.S. 1 (1906).

121. *Selective Service Cases*, 245 U.S. 366 (1918). The Court found that the involuntary servitude challenge to the draft was 'refuted by its mere statement'. *Ibid.* at 390.

York City.<sup>122</sup> The landlords failed to convince the Court that rent control—and the requirement that they supply heat and water without being able to raise the rent—constituted a badge or incident of servitude.

In majority opinions in two companion cases,<sup>123</sup> Justice Holmes noted that the shortage of emergency housing was ‘a publicly notorious and almost world-wide fact’. Perhaps Holmes’s attention to facts differed from his focus in *Bailey*, as some suggested, in part because Holmes had begun to fall under the influence of his colleague, Justice Brandeis, and to heed Brandeis’s fact-focused approach.<sup>124</sup> In the rent control cases, the facts allowed Holmes to defer to legislative restrictions on the ability of landlords to make the contracts they chose in the housing market. Holmes’s opinions evoked bitter, rather personal dissents. Three Justices joined McKenna’s warning to Holmes and the majority that they were opening the way for ‘socialism, or some form of socialism’ which would destroy ‘personal rights and the purposeful encouragement of individual incentive and energy’.<sup>125</sup>

Though not involving thirteenth amendment claims, *Hammer v. Dagenhart*<sup>126</sup> and *Adkins v. Children’s Hospital*<sup>127</sup> provide an illuminating

122. *Marcus Browning Holding Co. v. Feldman*, 256 U.S. 170 (1921) (New York).

123. *Ibid.*; *Block v. Hirsch*, 256 U.S. 135 (1921) (Washington, D.C.).

124. See, e.g., Samuel J. Konefsky, *The Legacy of Holmes and Brandeis* (New York, 1956); but see Letter from Oliver Wendell Holmes to Sir Frederick Pollock (May 16, 1919), reprinted in *Holmes-Pollock Letters*, 2 vols. (M. Howe, ed., Cambridge, 1941) ii: 13.

I hate facts. I always say the chief end of man is to form general propositions—adding that no general proposition is worth a damn. Of course a general proposition is simply a string for the facts and I have little doubt that it would be good for my immortal soul to plunge into them, good also for the performance of my duties, but I shrink from the base—or rather I hate to give up the chance to read this and that, that a gentleman should read before he dies.

See generally Walton H. Hamilton, ‘On Dating Mr. Justice Holmes’, *supra* note 33 at 24.

125. *Block v. Hirsch*, 256 U.S. 135, 161–63 (1921). The dissenters bemoaned the demise of the Constitution, *ibid.* at 160, 163, and proclaimed that fifth amendment prohibitions were being violated, though ‘[t]hey are as absolute as axioms. A contract existing, its obligation is impregnable.’ *Ibid.* at 163–64. By 1924, even Holmes was convinced that the District of Columbia had gone too far in proclaiming that the World War I emergency still applied; *Chasleton Corp. v. Sinclair*, 264 U.S. 543 (1924). He wrote for the court invalidating this extension of the rent control scheme. By then, however, not only was Taft Chief Justice, but President Harding had remade the Court with three additional appointments. It was the Taft Court which produced what was then a record high batting average of invalidated statutes, as well as embracing and expanding precedents that were to be invoked to strike down New Deal legislation in the early 1930s. For surveys of the carnage, see Edward S. Corwin, *The Twilight of the Supreme Court* *supra* note 7; Felix Frankfurter, *Mr. Justice Holmes, and the Supreme Court* *supra* note 12.

126. 247 U.S. 251 (1918).

127. 261 U.S. 525 (1923).

coda from the early Taft years. In *Hammer*, the Court decided that the Federal Child Labor Act of 1916 impinged upon the sovereignty of the states and thereby violated the tenth amendment. The 5–4 majority also found the Act to be an unconstitutional extension of Congress's commerce power. For the majority, there was a 'right to thus employ child labor'<sup>128</sup>—and an apparent corollary right of a child to be employed, here invoked by Dagenhart as next friend for two of his sons under age sixteen. Congress simply did not have the power to regulate despite the view that, as Justice Day put it, 'all will admit' that 'there should be limitations upon the right to employ children in mines and factories in the interest of their own and the public welfare'.<sup>129</sup>

Concern and care for the child had to remain exclusively with the states and the parents to whom states might delegate authority.<sup>130</sup> Work even in mines and factories was beyond Congress's constitutional ken. If paternalism toward children were to be allowed, it had to flow from the proper authorities. For the dissenters, Holmes pointed to the majority's inconsistency in allowing Congress to regulate oleomargarine, lottery tickets, the so-called White Slave trade, and strong drink, but not child labor.<sup>131</sup>

During the early Taft years, avoiding paternalism still meant invalidation of employment contract regulations.<sup>132</sup> Now there was an added wrinkle: striking down a District of Columbia law establishing minimum wages for women, Justice Sutherland claimed that the civil disability of women had reached 'the vanishing point' after passage of the nineteenth amendment.<sup>133</sup> Women should no longer receive special care and protection, but should compete as equals. Holmes, now in his eighties, disagreed: 'It will take more than the nineteenth amendment to convince me that there are no differences between men and women, or that the legislature cannot take those differences into account.'<sup>134</sup>

128. *Hammer*, 247 U.S. at 273.

129. *Ibid.* at 275.

130. See generally Morton Keller, *Affairs of State*, supra note 19 at 461–72. Keller quotes Ernst Freund, for example, stating that parental authority came to be 'power in trust . . . the authority to control the child is not the natural right of the parents; it emanates from the State, and is an exercise of police power'. Ernst Freund, *Police Power* (Chicago, 1904) 248. But Robert Wiebe makes the point that '[i]f humanitarian progressivism had a central theme, it was the child'. Robert H. Wiebe, *The Search for Order*, supra note 7 at 169.

131. 247 U.S. 251, 278–80 (1918).

132. See, e.g., *Wolff Packing Co. v. Court of Industrial Relations*, 262 U.S. 522 (1923); *Wolff Packing Co. v. Industrial Court*, 267 U.S. 552 (1925) and discussion in Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* supra note 12; Ray A. Brown, 'Due Process of Law, Police Power and the Supreme Court', 40 *Harvard Law Review* 943 (1927).

133. *Adkins v. Children's Hospital*, 261 U.S. 525, 553 (1923).

134. *Ibid.* at 569–70. Justice Taft's discomfort in his dissent, joined by Justice Sanford,

Thus, by 1923 the Court no longer relegated women to what the Justices saw as their natural God-given place.<sup>135</sup> Like blacks forty years earlier, women were now proclaimed to be full citizens. They had achieved *sui juris* legal status. The Court claimed that intermeddling through a minimum wage requirement would violate the constitutional presumption that each and every individual enjoys freedom of contract.

The *Hammer* and *Adkins* decision show that the Court had managed to come full circle. Just as seventeen year-olds could enlist in the army without the parental consent that was required by statute, so parents could send minors to the cotton mills while congressional attempts to intervene were held unconstitutional. Avoidance of paternalism permitted the Justices to pick and choose who would be protected, and to what degree, according to their own lights.

The very indeterminacy of the paternalism concept created a basic paradox of paternalism during the years Fuller and White were the Chief Justices. The Court enthusiastically thrust itself into the role of the ultimate paternalist. Lacking any coherent theory to confine their discretion, the Justices simply assumed the role of fathers who knew best.

## V. Conclusion

After World War I, the Supreme Court was poised to join or even to lead the country in its quest for a return to normalcy. Had the Justices paused to assess the status of paternalism when Taft joined them in 1921, they might have seen that earlier constitutional efforts to confine and control the threat were inconsistent and largely unavailing. The federal judiciary had not succeeded in its effort, as Brooks Adams put it, 'to dislocate any comprehensive body of legislation whose effect would be to change the social status'.<sup>136</sup> But protecting individuals and the nation from the dangers of

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ibid. at 562, is revealing. Taft clearly seemed to favor the result reached by the majority, but recognized that the precedents pointed the other way. He wrote, 'I have always supposed that the *Lochner Case* was thus overruled sub silentio' since the Court had begun 'laboriously pricking out a line' between the police power and liberty. Ibid. at 564, 562.

135. Compare *Adkins* with, e.g., *MacKenzie v. Hare*, 239 U.S. 299 (1915), in which the Court upheld a woman's loss of American citizenship when she married a foreigner. McKenna wrote for the Court: 'The identity of husband and wife is an ancient principle of our jurisprudence. It was neither accidental nor arbitrary and worked in many instances for her protection'. Ibid. at 311. He continued: 'There has been, it is true, much relaxation of it but in its retention as in its origin it is determined by their intimate relation and unity of interest, and this relation and unity may make it of public concern in many instances to merge their identity, and give dominance to the husband.' Ibid. at 311. See also *In re Lockwood*, 154 U.S. 116 (1894); *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872).

136. Brooks Adams, *The Theory of Social Revolutions* (New York, 1913) 218.

debilitating legislative protection was not a cause to be abandoned lightly and the Taft Court tried to stem the tide.

The mask covering the direct connection between halting paternalism and maintaining the economic and social status quo had begun to slip a bit. Holmes even suggested in his *Coppage* dissent that the Constitution would not forbid a state to 'establish the equality of position between the parties in which liberty of contract begins'.<sup>137</sup> Thus Holmes suggested that state intervention could precede individual contract decisions. This odor of redistribution probably provoked some of the most vehement fulminations against paternalism by the *Coppage* and *Adkins* majorities. After all, if any constitutional doctrine seemed settled during the prior half century, it was the impermissibility of redistribution by government.<sup>138</sup>

The conflation of paternalism and redistribution is significant. Today, we have some sense that politics near the turn of the century was actually the politics of redistribution,<sup>139</sup> and that state and federal governments have played redistributive roles throughout our history.<sup>140</sup> Yet there is probably no more basic strand of ideology—in a country without much of an ideological tradition—than unexamined enthusiasm for individualism and self-help.

If the Fuller and White Courts provoked criticism at times and even threats of reprisals,<sup>141</sup> the Justices also tapped into a fundamental American theme when they set out to choose who was a permissible subject for protection and what legislative initiatives were acceptable. Richard Hofstadter said in *The Age of Reform*:

One of the primary tests of the mood of a society at any given time is whether its comfortable people tend to identify, psychologically, with the power and achievements of the very successful or with the needs and sufferings of the underprivileged. In a large and striking measure the Progressive agitations turned the human sympathies of the people downward rather than upward in the social scale.<sup>142</sup>

137. *Coppage v. Kansas*, 236 U.S. 1, 27 (1915).

138. The usual first citation for the proposition is *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655, 662–63 (1875), but the statement was repeated constantly during the Fuller and White era. The same sentiment appeared in the reports of United States Supreme Court opinions at least as early as 1798 in Justice Chase's opinion in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798).

139. Richard L. McCormick, 'The Party Period and Public Policy: An Exploratory Hypothesis', *Journal of American History* 66 (1979) 279.

140. See, e.g., Henry N. Scheiber, 'Property Law, Expropriation, and Resource Allocation by Government: The United States, 1789–1910', *Journal of Economic History* 33 (1973) 232; Paul W. Gates, 'An Overview of American Land Policy', *Agricultural History* 50 (1976) 213; Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge 1977); Oscar Handlin and Mary Flug Handlin, *Commonwealth* (New York, 1948); Louis Hartz, *Economic Policy and Democratic Thought* (Cambridge, 1948).

141. For example, the Democratic Party included anti-Court planks in its 1896 and 1900 platforms, and Theodore Roosevelt triggered a movement to recall or restrain the Justices in 1912. See *supra* note 13.

142. Richard Hofstadter, *The Age of Reform*, (New York, 1955) 243–44.

The Supreme Court from 1888–1921 reacted by assuming the role of guardian against expression of such sympathies in law.

Deciding when to permit paternalism certainly is not an easy task. It can be difficult and sometimes impossible to distinguish between providing for people and deciding for them. Yet promiscuous use of the pejorative ‘paternalism’ interferes with any possibility of creating structures for, and providing analysis of, crucial distinctions. The Court’s struggle to identify and patrol paternalism, employing *a priori* categorizations and legal or scientific ideals allegedly deduced from first principles, became a juggling act that was hard to sustain while performing ‘the giddy trapeze act’ of constitutional law.<sup>143</sup>

Some paternalism goes with any judge’s territory, of course, and more is attached to the judicial icons at the Supreme Court. But the Fuller and White Courts used the threat of paternalism to arrogate an unusual degree of authority to themselves. The Justices set out to cleave the popular will from the popular whim, as James Russell Lowell once phrased the distinction.<sup>144</sup> The boundary they sought to establish to contain paternalism provided the Justices with a kind of constitutional accordion. They never approached a coherent theory of how to classify litigants or when it was appropriate to defer to legislative judgments. Instead, the Justices attempted to be the ultimate guardians of all Americans and American values.

It may be ‘a very bad lawyer who supposes that manipulability and infinite manipulability are the same thing’,<sup>145</sup> but my point is not that a number of Justices during this period could probably be called very bad lawyers. Rather, it is that the Justices’ efforts to deploy legal doctrine to contain paternalism provided particularly effective protective coloration for the interposition of their own values. Legal values, in turn, both reflected and helped to form the views of powerful contemporaries.

Through the lens of anti-paternalism, those victimized in societal struggle had only themselves to blame. Losers belonged in their places if winners could designate their status as fitting or natural. By seeking to constitutionalize what was seen as scientific and necessary, the Justices acted not only in paradoxical fashion, but with a fashionable scientism that now often seems tragic as well. Aggressive efforts to maintain a binary constitutional distinction between admirable autonomy and insidious paternalism characterized the Gilded Age through the time of Harding and Coolidge. We may have learned the lessons of the past so well that we are able to repeat its mistakes almost exactly.

143. Karl N. Llewellyn, ‘The Constitution as an Institution’, 34 *Columbia Law Review* 1, 14 n.28 (1934).

144. This ‘happy phrase’ by James Russell Lowell is quoted in Charles Warren, *The Supreme Court in United States History*, *supra* note 12 at ii: 751.

145. John Hart Ely, *Democracy and Distrust* (Cambridge, 1980) 112.

